LEE KIM MAH & 22 ORS.

v.

ABDUL RAHMAN B. SHARIF & ANOR.

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[SUIT NO. MR. 111 OF 1987]
13 JULY 1995

AGENCY: *Plaintiffs pleaded guilty and convicted of an offence under s. 6 of the Gambling Ordinance 1957 - Court ordering return of plaintiffs pocket money - First defendant was the officer who prosecuted the plaintiffs - First defendant misappropriating plaintiffs' money - Plaintiff filing claim for return of money - Whether second defendant as first defendant's employer is vicariously liable for the wrongful act of the first defendant in misappropriating plaintiffs' money - Whether the act of misappropriation was done in the course of employment - Whether the servant's act done to benefit himself makes any difference to the master's vicarious liability - Whether the second defendant is vicariously liable for the negligence of the first defendant.*

The plaintiffs herein together with 3 others were charged in the Magistrates' Court for an offence under s. 6 of the Gambling Ordinance 1957. They pleaded guilty and were each fined RM100. The Magistrate ordered that the sum of RM450 which was found as "table money" was to be forfeited but ordered further that the money recovered from the pockets of the plaintiffs was to be returned to the respective rightful owners. The prosecution of the 26 persons was conducted by the first defendant who was then a Police Inspector with the Royal Malaysian Police Force and the money was handed over to the first defendant for return to the plaintiffs.

The first defendant was subsequently convicted for criminal breach of trust of the said money and the plaintiffs brought an action against the first defendant and his employer, the second defendant, for the return of the said money.

The second defendant disputed liability on the grounds that the first defendant was not acting in the course of his employment at the material time and the question that arose was whether the second defendant is vicariously liable for the wrongful act of the first defendant in misappropriating the money. The further question that arose was whether the second defendant is vicariously liable for the negligence of the first defendant.

Held:

[1] It was clear from the three cases cited by Counsel for the plaintiffs, namely *Lloyd v. Grace Smith & Co., Uxbridge Building Society v. Pickard, and Morris v. C. W. Martin & Sons,* that the criminality of the act of the servant is not a crucial issue. Furthermore the fact that only the servant benefited from his act is also not a decisive factor. The crucial issue is whether the act of the servant was within or outside the scope of his employment and to determine that it is necessary to examine whether the servant had apparent or ostensible authority in the position he held to deal with others.

[2] The task of the first defendant in so far as the money was concerned was to return it to the rightful1 owners. He was ordered to do so by the Magistrates Court as well as upon the agreement of ASP Ting. It was clear from the evidence adduced that the first

defendant was in the course of performing his duty when he committed the act upon which he was convicted. In the circumstances the dishonest act of the first defendant cannot be described as anything but one done with ostensible, if not apparent, authority and in the course of his employment as the prosecuting officer and while in the employment of the second defendant.

[3] To say that any dishonest acts of any of the servants of the second defendant should not come within the scope of their employment is presumptuous and unfair. It is the second defendant which entrusted to its employees the operations of the various government departments in the country. Hence it should be answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that goods are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them.

[4] In any event there is no dispute that the first defendant admitted his own negligence. Furthermore, at the material time, the first defendant had the custody of the money by virtue of his position as the prosecuting officer in the employment of the second defendant. In the circumstances the admitted negligence of the first defendant was committed in the course of his employment and the second defendant, as employer, is vicariously liable for the negligence of the first defendant in the performance of his duty.

[Plaintiffs' claim against the second defendant allowed with costs].

Cases referred to:
Samin bin Hassan v. Government of Malaysia [1976] 2 MLJ 211 ***(dist)***
Zakaria bin Che Soh v. Chooi Kum Loong & Anor. [1985] 1 CLJ 310 ***(dist)***
Lloyd v. Grace, Smith & Co. [1911-1913] All ER 51 HL ***(refd)***
Uxbridge Blg. Soc. v. Pickard [1939] 2 All ER 344 CA ***(refd)***
Morris v. CW Martin & Sons [1965] 2 All ER 725 ***(refd)***
Keppel Bus Co. Ltd. v. Saad [1974] 3 PCC 75 ***(refd)***
Goh Choon Seng v. Lee Kim Soo [1925] 1 PCC 225 ***(refd)***

Legislation referred to:
Gambling Ordinance 1957 s. 6(1)

For the plaintiff - Jimmy Wee; (Ivy Suli Untup with him) M/s. Jimmy HT Wee & Co.
For the second defendant - Ahmad Radzif, Federal Counsel

JUDGMENT

Richard Malanjum J:

Background undisputed facts:

On 23 November 1985 at about 11 p.m. a police party raided a premises on the 2nd floor of Lot 256, Taman Jade Manis, Miri. In the premises 26 persons were arrested for gambling a prohibited game of "Pai Kow" in a common gaming house. Upon their arrest these 26 persons were made to take out their money from their pockets. Only 3 of them did not have any money in their pockets.

Subsequently, all the 26 persons were charged in the Magistrate Court Miri on 26 September 1985 under Magistrate Court case No. MC/CR/321/85/2 (the criminal trial). They pleaded guilty to the charge under s. 6(1) of the Gambling Ordinance 1957 and were each fined in the sum

of RM100. The sum of RM450 which was found as 'table money' was forfeited. But the money found in the pockets of 23 of them although marked as exhibits P1-P22 (exhibits P1-22) for the purpose of the criminal trial was ordered to be returned to the respective rightful owners. The prosecution of the 26 persons was conducted by the 1st defendant in this action. He was then a Police Inspector with the Royal Malaysian Police Force. And there is no dispute that the order by the learned Magistrate to return the seized money of the 23 persons was known to the 1st defendant at all material times.

Unfortunately, the order of the learned Magistrate was never carried out. By a letter dated 16 October 1985 the Divisional Superintendent of Police Miri wrote a letter to Messrs C.C. Lau, Wee & Co. to the effect as follows, verbatim:

> **Re: PP v. Lee Kim Mah & 24 Others**
>
> I am directed to refer to your letter JW/Ch dated 9 October 1985 on the above subject.
>
> 2. Please be informed that the said cash is confirmed missing from our custody. Report to that effect had been lodged and investigation has commenced *vide* CPS(M) Rpt/2971/85 and Investigation Paper No. 442/85. You will be informed of the outcome of the investigation in due course.
>
> 3. Regret unable to keep you posted at this instant as to when your clients would be able to get their money back, please.

True to his words the divisional superintendent of police was not able to indicate when the money could be returned. Hence, on 17 June 1987 two letters were issued by the solicitors of the plaintiffs to the 1st defendant and to the divisional superintendent of Police Miri respectively demanding the return and giving notice of a pending legal action upon failure to do so.

The foregoing facts are as gathered from the documents in the agreed bundle of documents admitted as "Exh. A". The learned Federal Counsel made no objection to the authenticity and contents of those documents.

The Action

In this instant case the plaintiffs in their amended statement of claim are making their claim against the 1st defendant and the 2nd defendant jointly and/or severally for the following, (verbatim):

(a) the sum of Malaysian Ringgit RM$35,100
Singapore Dollars S$ 10,119
Brunei Dollars B$ 1,482
or its equivalent in Malaysian currency;

(b) interest thereon at 8% per annum from 26 September, 1985 until full payment;

(c) costs and

(d) such other relief as this Honourable Court shall deem fit.

The plaintiffs also averred to be the lawful owners of exhibits P1-22.

The 1st defendant did not contest the claim of the plaintiffs. A default judgment was therefore entered against him. And the 2nd defendant in defence did not expressly dispute the allegations in the amended statement of claim. But the foundation of its denial of any liability as pleaded in the statement of defence was that the 1st defendant was not acting in his course of employment at the material time.

At the commencement of the hearing of this case the parties also agreed besides "Exh. A" the following:

(i) the agreed facts marked as "B"; and

(ii) the admission of the record of appeal in respect of Criminal Appeal No. MR. 6 of 1994 which was subsequently marked "Exh. Pl".

It is to be noted that the Federal Counsel appearing for the 2nd defendant raised no objection to any of the contents of "Exh. Pl" when it was tendered as an exhibit by PW1 William Tiong, the Registrar of the Subordinate Court Miri. In fact PW1 was the only witness called for this trial. The 2nd defendant did not call any witness, contented to rest its case on legal arguments.

And for completeness I should reproduce the agreed facts "B" verbatim:

Agreed Facts

1. That the 1st defendant is and was at the material time an Inspector with the Royal Malaysian Police Force attached to prosecution branch of the Central Police Station, Miri.

2. The 1st defendant was under the employment of the 2nd defendant.

3. That on 26 September 1985 plaintiffs were charged in the Magistrate's Court, Miri under s. 6(1) of the Gambling Ordinance for gaming 'Pai Kow'.

4. That the plaintiffs all pleaded guilty and were each fined RM100 and that the 1st defendant was the Prosecutor at the material time.

5. That the Magistrate's Court ordered exhibits P1-P22 consisting of pocket moneys belonging to the respective plaintiffs to be returned to them.

6. That the said exhibits P1-P22 were handed over to the 1st defendant on 26 September 1985 for return to the plaintiffs by Madam Freda John, Court Interpreter of the Magistrate's Court Miri.

7. That the amount handed over to the 1st defendant by Freda John amounted to RM35,100, S$10,119 and B$1,482 (hereinafter collectively referred to as 'the said money').

8. That the 1st defendant was convicted of Criminal Breach (*sic*) of Trust of the said money in the Sessions Court Miri in Case No. SC/CR/30/1985 and was sentenced to imprisonment term of 18 months on 27 October 1993.

9. That the 1st defendant appealed against his conviction to the High Court at Miri under Case No. Criminal Appeal No. MR. 6 of 1994 whose appeal was dismissed and sentence enhanced by an additional fine of RM4,000 in default 6 months additional imprisonment term.

The Issues

Learned Counsel for the plaintiffs submitted that there are two matters to be considered, namely:

(i) on a point of law of whether the 2nd defendant is vicariously liable for the wrongful act of the 1st defendant in misappropriating the exhibits P1-22; and

(ii) on the question of whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant.

The learned Federal Counsel agreed to both matters as the issues before this Court. Hence, this judgment is therefore focused on those issues.

Issue (i): Whether the 2nd defendant is vicariously liable for the wrongful act of the 1st defendant in misappropriating exhibits P1-22:

(a) The contentions

Learned Federal Counsel submitted that the 2nd defendant should not be held liable for the act of the 1st defendant in committing a criminal breach of trust in which he was charged and convicted. Such act according to him was not done in the course of his employment with the 2nd defendant. And by committing the offence the chain of the course of employment was broken thereby excluding the 2nd defendant from any liability.

It was further argued by the learned Federal Counsel that although to some extent an unauthorised act of a servant may make a master vicariously liable, it should not be in a case where the act was committed by the servant to benefit himself. And he cited the following cases, *Samin bin Hassan v. Government of Malaysia* [1976] 2 MLJ 211 and *Zakaria bin Che Soh v. Chooi Kum Loong & Anor.* [1985] 1 CLJ 310.

In reply, learned Counsel for the plaintiffs said that he found no local decision pertaining to this issue. As such he relied on the decisions of the English Courts, namely:

(a) *Lloyd v. Grace, Smith & Co.* [1911-1913] All ER 51 HL;

(b) *Uxbridge Blg. Soc. v. Pickard* [1939] 2 All ER 344 CA; and

(c) *Morris v. CW Martin & Sons* [1965] 2 All ER 725.

Learned Counsel said that these cases involved the commissions of various offences by the servants yet the masters were made liable as the acts of the servants were held to be within the scope of their employment.

Learned Counsel argued that the point to consider should be whether the act committed by the servant was within or outside the scope of his employment. And learned Counsel said that to determine such a point it should be examined whether the servant had apparent or ostensible authority to deal with third parties. If he had then the master should be liable.

In the instant case learned Counsel contended that the 2nd defendant should be liable as the 1st defendant was not only the prosecuting officer but was also authorised to receive the exhibits P1-22. There was no other officer involved. Learned Counsel also pointed out that on pages 20-21 of Exh. P1 it showed that the 1st defendant was also asked by one ASP Ting Tiang Nang, the officer in charge of prosecution (ASP Ting) regarding the exhibits. But

after the 1st defendant said that he would keep them, the said ASP Ting agreed. To this learned Counsel said that that indicated further authorisation to the 1st defendant and hence he acted within his scope of employment.

As regards the two cases cited by the learned Federal Counsel, the learned Counsel for the plaintiffs submitted that they were not applicable to the facts of the present case. Those cases involved negligence and not criminal acts of the servants.

(b) The law

In *Lloyd's* case *(supra)* it was held that the fraud committed by the clerk of the solicitor was taken to have been committed in the course of the clerk's employment. Hence, the solicitor was liable to the client although he was innocent of the fraud and which fraud was committed not for the benefit of the solicitor but for the benefit of the clerk himself.

Briefly, the facts of that case was that the solicitor's managing clerk was authorised by the solicitor to receive deeds and carry through sales and conveyances on the solicitors's behalf. And while acting as the representative of the solicitors's firm persuaded a client of the firm to sign documents the contents of which the client was not aware. The end result was that the clerk secured a freehold property which was subsequently sold after calling in the mortgage. The clerk appropriated both the mortgage and the sale proceeds. The solicitor was innocent of the act of the clerk and derived no benefit. The jury however found that in receiving the deed and taking instructions to call in the mortgage and to sell the free-hold property the managing clerk professed to act as conveyancing manager to the solicitor.

In his speech at pg. 59H Lord Macnaghten opined to be the true principle 'that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud'.

His Lordship went on to say thus: at p. 59H-1:

> It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the frauds. I think, too, that the expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" ... as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally ...

The case of *Uxbridge's* case (*supra*) saw the principle in *Lloyd's* case *(supra)* being applied even where the fraud involved forgery. It was held that so long as the solicitor's managing clerk was acting within his ostensible authority, the master was liable. The head note of that case reads:

> A solicitor's managing clerk obtained an advance of a sum of £500 upon a mortgage of property by producing to the society's solicitors a fictitious deed. It was not proved that the solicitor's clerk actually forged the deed, but he must have known that it was a forged document. It was contended that, as the lenders were not clients of the solicitor, the rule in *Llyod v. Grace, Smith & Co.* did not apply. It was also contended that the solicitor could not be made liable for the fraudulent acts of his clerk where the fraud involved forgery. It was held as a fact that the clerk had ostensible authority for all that he did in the matter.

In his judgment, Sir Wilfred Greene, MR at p. 348 said this:

> ... When a person is put in that position, his actual authority and his ostensible authority are, in one sense, the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. The ostensible authority, however, may go a little further, for the reason that it is not within his actual authority to commit a fraud. Nevertheless, it is within his ostensible authority to perform acts of the class I have mentioned. So long as he is acting within the scope of that class of act, his employer is bound, whether the clerk is acting for his own purpose or for those of his employer.

Of course the class of act referred thereto related to the duties of the solicitor's clerk as the managing clerk of the legal firm.

In *Morris's* case (*supra*) it involved a different situation from the preceding cases hereinabove. The plaintiff in that case sent her mink stole to a furrier for cleaning. But the furrier did not do cleaning. However he told the plaintiff that he would arrange for the defendants to do the job. The plaintiff agreed. The furrier arranged with the defendants as principal and not as agent to have the fur cleaned. The defendants knew the fur belonged to a customer of the furrier. Nevertheless the current trade conditions were applicable, *inter alia*, that the defendants would compensate for damage due to negligence of the defendants in the processing but not by reason of any other cause whatsoever. A new employee of the defendants who was given the task of cleaning stole the fur while in his custody. The defendants had no reason to suspect the honesty of the new employee. The Court of Appeal found for the plaintiff on three basic reasons, namely,

(a) "where a master had in his charge goods belonging to another in such circumstance that he was under a duty to protect them from theft or depredation, then, if he entrusted that duty to a servant or agent, he was liable for the servant's breach of it, notwithstanding that the breach was a criminal act";

(b) that the defendants as sub-bailees for reward were under a duty of care; and

(c) that the defendants were bailees for reward towards the plaintiff and thus liable to the plaintiff for conversion or for negligence. The defendants were vicariously liable for breach of duty notwithstanding the act of the employee was criminal since he was the person the defendants chose to discharge their duty to take care and clean the fur.

In my view these three cases appear to have a common factor and that is, the criminality of the act of the servant is not crucial. And the fact that only the servant benefited from his act is also not a decisive factor. It is whether the act of the servant was within or outside the scope of his employment. And to determine that, it is to be examined whether the servant had apparent or ostensible authority in the position he held to deal with others. These matters, of course, are questions of facts to be considered based on the evidence adduced. That was what Lord Kilbrandon said in a Singapore case of *Keppel Bus Co. Ltd v. Saad* [1974] 3 PCC 75 at p. 78:

> ... that the question in every case is whether on the facts the act done, albeit unauthorised and unlawful, is done in the course of the employment; that question is itself a question of fact ... A jury, however, would be entitled to find that the act was done in the course of the employment only if there were facts proved which established the extent of the master's delegated authority, express or implied, and that the servant's act was done under that authority, as part of his duty to his employer.

And it is interesting to note the observation of Lord Phillimore in another Singapore case of *Goh Choon Seng v. Lee Kim Soo* [1925] 1 PCC 225 pertaining to the categorization of cases involving master-servant liability. At p. 228 his Lordship said this:

> As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (i) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (ii) and (iii). Under head (ii) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (iii) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master had not authorised and would not have authorised, had he known of it. In these cases the master is, nevertheless, responsible.

Bearing in mind the foregoing observation, the two cases relied upon by the learned Federal Counsel appear to fall within category (i). But the facts in the present case do not fall within that category. Thus, with respect, I do not think those cases have any relevance to the issue at hand.

(c) Finding

As stated earlier in this judgment that there was no dispute on the facts of this case as contained or found in the statement of agreed facts "B", agreed bundle of documents "Exh. A" and in "Exh. P1" - appeal record. There was no dispute that the 1st defendant had the custody of exhibits P1-22 by virtue of his position as the prosecuting officer of the Royal Malaysian Police Force, a department of the 2nd defendant. And the 1st defendant was supposed to return those exhibits to the rightful owners being part of his duty after the Magistrate Court had made the order. Further, after being queried by ASP Ting it was again agreed that the 1st defendant would execute the order of the Magistrate Court. There was no evidence adduced to show that the 1st defendant had no authority to handle those exhibits. It was quite to the contrary. Neither was there any evidence adduced indicating the nature of the task of the 1st defendant and that what he did was not in the course of carrying out that task. In fact the task of the 1st defendant in so far as the exhibits were concerned was to return them to the rightful owners. He was ordered to do that by the Magistrate Court as well as upon the agreement of ASP Ting. But in the process he misappropriated them. Thus, I find as a fact based on the evidence adduced that the 1st defendant was in the course of performing his duty when he committed the act upon which he was convicted. On that basis I do not think the dishonest act of the 1st defendant can be described as anything but that it was done with ostensible, if not apparent, authority and in the course of his employment as the prosecuting officer and while in the employment of the 2nd defendant. To my mind the act of the 1st defendant fits into category (iii) of Lord Phillimore's observation in *Goh Choon Seng's* case (*supra*). If the dishonest act was done by another person who had nothing to do with the criminal trial from which the exhibits came about, then perhaps the contention of the learned Federal Counsel should merit further consideration. But, to say that any dishonest acts of any of the servants of the 2nd defendant should not come within the scope of their employment, I think, is too presumptuous and unfair. It is the 2nd defendant which entrusted to its employees the operations of the various government departments in the country. Hence, it should be answerable for the manner in which that servant or agent

carries out his duty. If the servant or agent is careless so that they (goods) are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them per Lord Denning MR in *Morris's* case (*supra*) at p. 732E.

I find therefore the answer to issue (i) to be in the affirmative.

Issue (ii): Whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant:

(a) Finding

In view of my finding on issue (i) I do not think it is necessary for me to consider this issue (ii) in any great detail. Suffice it to say that in the event that I am wrong in my conclusion to issue (i) there is no dispute that the 1st defendant admitted his own negligence. (See: p. 86-87 of Exh. P1). Further, there is no doubt that at the material time the 1st defendant had the custody of exhibits P1-22 by virtue of his position as the prosecuting officer in the employment of the 2nd defendant. Thus, for the same reasons given when I was dealing with issue (i) I find the admitted negligence of the 1st defendant to have been committed while in the course of his employment. And being the employer of the 1st defendant the 2nd defendant is vicariously liable for the negligence of the 1st defendant in the performance of his duty. There are a host of authorities on that point including *Zakaria's* case *(supra)*.

For this issue (ii) my conclusion must necessarily be in the affirmative as well.

Conclusion

By reason of my findings hereinabove I hereby enter judgment for the plaintiffs and that the 2nd defendant is liable to pay the plaintiffs the following:

(a) the sum of Malaysian Ringgit RM35,100;

(b) the sum in Malaysian Ringgit equivalent to Singapore dollars S$10,119;

(c) the sum in Malaysian Ringgit equivalent to Brunei dollars B$1,482;

(d) there shall been interest for (a), (b) and (c) at the rate of 8% p.a. from 26 September 1985 until payment; and

(e) costs.